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No. 91-1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL FIGURES and DR. JOSEPH MITCHELL
for themselves and on behalf of all
other persons similarly situated,
Appellants,

vs.

PAUL CHARLES WESCH, et al.,
Appellees.

On Appeal From the United States District Court
For The Southern District of Alabama

APPELLEE PAUL CHARLES WESCH'S MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the District Court abused its discretion in denying the Appellants' Rule 60(b) motion to modify a court-ordered interim congressional redistricting plan in light of objections interposed by the Justice Department to a separate, legislatively-enacted plan pursuant to Section 5 of the Voting Rights Act.

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PAUL CHARLES WESCH, et al.,

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On Appeal From the United States District Court
For The Southern District of Alabama

APPELLEE PAUL CHARLES WESCH'S MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, the Appellee Paul Charles Wesch moves the Court to dismiss this appeal or, in the alternative, to summarily affirm the decision of the District Court on the following grounds:

1. The question presented by this appeal is insubstantial.

2. The decision of the District Court is so manifestly correct as not to merit further argument.

STATEMENT

The Appellee Paul Charles Wesch initiated this action in the United States District Court for the Southern District of Alabama, seeking declaratory and injunctive relief based on his contention that Alabama's existing congressional districts violated Article I, Section 2 of the Constitution. Although they were aware of the suit within a few days after it was filed, the Appellants Michael Figures and Dr. Joseph Mitchell waited more than two months before filing a Motion to Intervene on behalf of themselves and all African-American citizens of Alabama (Appendices A and B). The District Court granted the Motion to Intervene but specified that all applicable pre-trial deadlines would remain fixed. (Appendix C).

This case was tried on January 3 and 4, 1992 before a three-judge panel convened pursuant to 28 U.S.C. § 2284(a). At trial, the parties stipulated that the African-American population of Alabama was sufficiently compact and contiguous to allow the creation of a congressional district with a total population that was 65% or more African-American, and that such a district should be created. (Appendix D). The Court also received testimony concerning six proposed redistricting plans, only one of which — the "Hilliard Plan" — contained two majority African-American districts.

While the case was under submission to the District Court, the Alabama Legislature adopted its own congressional redistricting plan. Thereafter, the Court entered an order declaring Alabama's then existing congressional districts unconstitutional and enjoining any further elections under those districts. The Court further ordered into effect, on an interim basis, a redistricting plan containing a single majority African-American district, unless the Legislature's plan, which also contained only one majority African-American district, received preclearance under Section 5 of the Voting Rights Act by 12:00 noon, March 27,

1992. The Court denied a motion to adopt the Legislature's plan on an interim basis pending preclearance.[1] (App. to Jurisdictional Statement 5a - 6a, 150a - 152a).

On March 27, 1992, the Justice Department refused to preclear the Legislature's plan because the state had not adequately explained why the plan contained only one majority African-American district instead of two. (App. to Jurisdictional Statement 222a). The Appellants then filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, asking the Court to modify its plan in light of the Justice Department's objection so as to include two majority African-American districts. (App. to Jurisdictional Statement 174a). The District Court denied this motion (App. to Jurisdictional Statement 184a), and this appeal followed.

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[1]This aspect of the District Court's Order has already been affirmed by this Court in *Camp v. Wesch*, No. 91-1553 (May 18, 1992).

ARGUMENT

1. The standard of review.

The Appellants contend that the District Court erred by denying the Appellants' Rule 60(b) motion to modify the court-ordered redistricting plan to include two majority African-American districts instead of one. The resolution of a Rule 60(b) motion is within the trial court's discretion, and the only inquiry on appeal is whether the trial court's ruling was an abuse of that discretion. *Browder v. Director, Illinois Dept. of Corrections*, 434 U.S. 257, 263 n.7, 98 S.Ct. 556, 54 L.Ed. 2d 521 (1978); *First National Life Insurance Co. v. California Pacific Life Insurance Co.*, 876 F.2d 877 (11th Cir. 1989); *Sullivan v. Houston Independent School District*, 475 F.2d 1071 (5th Cir. 1973).

2. The District Court did not abuse its discretion by denying the Appellants' motion to modify the court-ordered redistricting plan.

The Appellants presented no evidence at trial that a redistricting plan which contained only one majority African-American district would violate the 1965 Voting Rights Act by impermissibly fragmenting or diluting African-American voting strength. On the contrary, at least three witnesses, including the Appellants' own expert and Dr. Joe Reed, one of Alabama's leading African-American political figures, expressed serious doubts concerning whether two viable African-American districts could be created in Alabama. (See testimony of Dr. Richard L. Engstrom, Appendix E; testimony of Dr. Joe Reed, Appendix F; and testimony of Jerry Wilson, Appendix G). The Appellee Wesch's expert witness, Dr. Richard L. Engstrom, testified that in his opinion the Sam Pierce "Zero" Plan proposed by the Appellee — which was ultimately adopted almost in its entirety by the Court — provided African-American citizens with a reasonable opportunity to elect a candidate of their choice and did not dilute African-American voting strength. (Appendix E). Moreover, the

Appellants agreed to a stipulation that called for the creation of a majority African-American district with 65% or more African-American population. (Appendix D). When the Court pointed out to counsel for the Appellants that this stipulation would preclude the adoption of the Hilliard Plan, which contained two majority African-American districts, counsel for the Appellants responded that he was familiar enough with the wishes of the African-American citizens of Alabama to agree to the stipulation nevertheless. (Appendix H). Accordingly, it is clear (a) that the Appellants made a conscious, calculated, and deliberate decision not to advocate the creation of two majority African-American districts at trial and (b) that in fact no evidence was presented to the District Court to support a finding that two viable African-American districts could be created in Alabama in 1992, or that a plan which contained only one majority African-American district would dilute minority voting strength. Following the Justice Department's refusal to preclear the Legislature's Plan, the Appellants sought to abruptly reverse their position by asking the District Court to implement a two-majority African-American district plan. Rule 60(b), however, is not intended as a vehicle through which litigants can relieve themselves from "free, calculated, deliberate choices" because hindsight indicates to them that those choices may have been wrong. *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950).

Faced with the absence of any evidence before the District Court that a plan containing only one African-American district impermissibly dilutes African-American voting strength in Alabama, the Appellants premise their entire argument on the assertion that the District Court was compelled to alter its *own* plan because the Justice Department had refused Section 5 preclearance to the *Legislature's* plan. This argument, if upheld, would mean that the Justice Department would effectively have veto power over a *court-ordered* redistricting plan even in cases

in which a court-ordered plan was not subject to any direct review by the Justice Department. Such a result is neither warranted by Section 5 of the Voting Rights Act nor by this Court's limitations upon the scope of Section 5.

Section 5 (42 U.S.C. § 1973c), by its terms, requires states and political subdivisions to obtain "preclearance" either from the Attorney General or the United States District Court for the District of Columbia before any change affecting voting — such as a congressional redistricting plan -- may be implemented. Court-ordered plans, however, are not subject to this preclearance requirement. *Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed. 2d 268 (1971). Rather, only "legislative plans" must be precleared. "The essential characteristic of a legislative plan is the exercise of legislative judgment . . . [that is], a proposal reflecting the policy choices of the elected representatives of the people . . ." *McDaniel v. Sanchez*, 452 U.S. 130, 152 - 53, 101 S.Ct. 2224, 68 L.Ed. 2d 724 (1981) (bracketed material added for clarification). In this case, the District Court made a specific finding that the plan it substantially adopted was not a "legislative plan" subject to the Section 5 preclearance requirement. (App. to Jurisdictional Statement 151a)[2]. Because Section 5 does not even apply to the District Court's plan, it obviously makes little sense to argue, as the Appellants do here, that the Court's plan violates Section 5 because the legislative plan failed to receive Section 5 preclearance.

Even though the Court plan was not itself subject to Section 5, the Appellants argue that the District Court was bound to follow the Justice Department's rejection of the legislative plan as an "administrative precedent" and to adjust its plan in accordance with the Justice Department's comments concerning the

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[2] The Appellants have not challenged this finding and, in any event, the District Court's underlying judgment is not subject to review on appeal from the denial of a Rule 60(b) motion. *Browder, supra*, 434 U.S. 257, 263 n.7.

creation of a second majority African-American district. This argument is without merit. Because the Section 5 preclearance requirement does not apply to court-ordered redistricting plans which do not reflect legislative policy choices, the *Court*, not the Justice Department, is the proper body to decide whether such plans conform with the Voting Rights Act. Moreover, under the circumstances of this particular case, the District Court had ample justification for refusing to treat the Justice Department's administrative ruling on the Legislature's plan as a binding precedent with respect to the court-ordered plan. The Justice Department's rejection of the Legislature's plan, when analyzed carefully, does not amount to a final determination by the Attorney General that the Voting Rights Act requires the creation of two majority African-American congressional districts in Alabama. On the contrary, the Attorney General's letter merely states that the State was not able, in the limited time available, to adequately explain the failure to create a second majority African-American district. The letter explicitly invites review of the decision either via a declaratory judgment proceeding in the United States District Court for the District of Columbia or an administrative reconsideration by the Justice Department. The letter further notes that the failure to create a second majority African-American district appeared to be motivated by a "desire to protect incumbent members or to serve parochial political interests." (App. to Jurisdictional Statement 224a). However, the District Court had the benefit of a full evidentiary hearing and heard testimony from some of the Appellants' own witnesses concerning their reservations about whether two viable majority African-American districts could be created in Alabama in 1992. Dr. Joe Reed testified that he would not advise the creation of a plan with two majority African-American districts because "the safest way to get a black district is to draw one district sixty-five percent or above," and that based on his knowledge of Alabama politics he "felt much better drawing one district predominantly black with over sixty-five percent black

in it." (Appendix F). Jerry Wilson, the Appellants' own expert witness, testified that he had concerns about whether Alabama's African-American population concentrations could be divided between two viable majority districts because of the "strong burden" such a scheme would place on the African-American community to register and turn out to vote. Mr. Wilson also testified that in evaluating the viability of a two-majority African-American district plan he would consider the opinion of black political leaders concerning the plan "very important." (Appendix G). Further, the Appellee Wesch's expert witness, Dr. Engstrom, testified that he believed the single-majority African-American district plan proposed by the Appellee did not dilute minority voting strength. (Appendix E). Certainly the District Court was entitled to give this testimony substantial weight and to conclude that only one African-American district should be created - not to protect incumbents or "to serve parochial political interests", but to insure that African-American citizens of Alabama would truly have a viable opportunity to elect a candidate of their choice in one district, rather than attempting to spread African-American voting power between two districts of questionable viability. Under these circumstances, it was plainly within the District Court's discretion to deny the Appellants' Rule 60(b) request to modify the court-ordered plan to provide for a second majority African-American congressional district.

CONCLUSION

The fundamental question presented by this case is whether a District Court has the power to decide for itself what the Voting Rights Act requires when creating a court-ordered redistricting plan, or whether that determination is controlled by an admittedly hurried administrative finding made by the Justice Department pursuant to a statute which has no applicability to court-ordered plans. The Appellee respectfully submits that the answer to this question is so obvious that this appeal patently presents no substantial federal question. Even the broadest of readings of Section 5 cannot lead to the conclusion that Congress ever intended to require a District Court to ignore the testimony presented to it and to abdicate its power to decide the law in favor of an administrative determination made by another branch of government. Moreover, the decision of the District Court in this particular case was amply supported by the evidence and was within the broad discretion afforded to a District Court in ruling on a Rule 60(b) motion. For these reasons, this Court should either dismiss this appeal or, in the alternative, summarily affirm the decision of the District Court.

DAVID A. BOYETT, III
(Counsel of Record)

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DATED: July 1, 1992

APPENDIX

APPENDIX A

[131] * * *

BY MR. ANDERS:

Senator Figures, I am Ferrell Anders. I am one of the attorneys for the plaintiff in this case.

A Yes, sir.

Q When did you first hear of the Wesch suit?

A It was the morning — the day before I called you.

Q And that was within a few days after the suit was filed?

A I believe it was the next couple of days or so.

Q And shortly thereafter you had someone pick up a copy from my office, did you not?

A That is correct.

Q And that was probably within four or five days from the date the suit was filed?

A Yes, sir. That is correct.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 91-CV-787

PAUL CHARLES WESCH,
Plaintiff,

vs.

GUY HUNT, JAMES H. EVANS, BILLY JOE CAMP,
LIONEL W. NOONAN, HARRY D'OLIVE,
DEVON WIGGINS, OTHA LEE BIGGS, JERRY BOGAN,
CLARENCE WALTERS, and TOM W. TURNER,
all sued in their official or representative capacities only,
Defendants.

MOTION FOR LEAVE TO INTERVENE

Come now Michael Figures and Joseph Mitchell for themselves and all other persons similarly situated and respectfully move the Court pursuant to and in accordance with the provisions of Rule 24(a) and (b), Federal Rules of Civil Procedure, for an Order permitting them to intervene, for themselves and all other persons similarly situated as Plaintiffs in this action and permitting them to intervene as Party Plaintiffs herein and permitting them to file the Complaint in Intervention attached hereto. Intervention herein is sought for the purpose of addressing the factual and legal issues relating to the declaration that the existing apportionment of the congressional districts for the State of Alabama is unconstitutional and in violation of the one-person, one-vote requirement of the U.S. Constitution and in violation of the Voting Rights Act, 42 USC §1971 et seq. and also relating to Redistricting of the State into seven congressional districts of substantially equal populations in conformity with

the Voting Rights Act, 42 U.S.C. § 1971 *et seq*. In support of this Motion for Leave to Intervene, Applicants for Intervention sets out and assigns the following:

1. Applicants for Intervention and those persons whom they seek to represent herein are Qualified Electors who are African American residents of the State of Alabama.

2. Applicants for intervention and members of the class of persons they seek to represent herein aver that the present congressional redistricting plan violates 42 U.S.C. § 1971 et seq in that the existing Congressional district lines do not allow a reasonable opportunity for the election of an African American to Congress from the State of Alabama and results in the denial or abridgment of the right of Applicants for Intervention to vote on an account of race or color in violation of §2 of the Voting Rights Act of 1965, 42 U.S.C. §1973.

3. Applicants for Intervention, for themselves and all other person similarly situated, are entitled to intervene as a matter of right pursuant to and in accordance with the provisions of Rule 24(a), Federal Rules of Civil Procedure, because Applicants and the class of persons they seek to represent have a substantial interest in the subject matter of the litigation, and particularly those legal and factual issues which relate to the drawing of a new congressional redistricting plan in time for such a plan to be effectively implemented prior to the congressional primary election scheduled for June 2, 1992. Applicants for Intervention and all other persons similarly situated have a substantial interest in any congressional redistricting plan to insure that the requirements of the Voting Rights Act are not violated. The disposition of this case as to the constitutionality of the present congressional districting plan will as a practical matter impair or impede the ability of Applicants, and those whom they seek to represent, to protect their interests. The interests of the Applicants and those persons who are similarly situated are not adequately represented by the existing parties.

4. Applicants for Intervention, and those persons similarly situated, should be granted permissive intervention in this action pursuant to and in accordance with the provisions of Rule 24(b), Federal Rules of Civil Procedure, because the claims of the Applicants and the issues currently pending before the Three Judge District Court have questions of law and fact in common; the Applicants and those persons similarly situated whom they seek to represent will be bound by any judgment, decree or order entered or to be entered in this action. Intervention by Applicants, for themselves, and on behalf of those persons similarly situated, will not in any way delay or prejudice the further adjudication of the rights of the original parties.

WHEREFORE Applicants for Intervention, for themselves and all persons similarly situated, respectfully move the court for an Order permitting them to intervene, for themselves and all persons similarly situated, as Plaintiffs in this action and allowing them to file the attached Complaint in Intervention. Applicants for Intervention further respectfully move that they be accorded the right to orally argue their claims before the Court.

Submitted by,

/s/ John H. England, Jr.
John H. England, Jr.

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/s/ Ronnie L. Williams
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814 St. Francis
Mobile, AL 36602

ATTORNEYS FOR APPLICANTS IN INTERVENTION, FOR THEMSELVES AND ALL PERSONS SIMILARLY SITUATED

CERTIFICATE OF SERVICE

This is to certify that I have this 3rd day of December, 1991 served a copy of this Motion on each of the following by depositing a copy of same in a properly addressed envelope with adequate postage thereon:

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/s/ John H. England
Attorney for Applicants
in Intervention

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 91-0787-BH

PAUL CHARLES WESCH,
Plaintiff,

vs.

GUY HUNT, JAMES H. EVANS, BILLY JOE CAMP,
LIONEL W. NOONAN, HARRY D'OLIVE,
DEVON WIGGINS, OTHA LEE BIGGS, JERRY BOGAN,
CLARENCE WATTERS, and TOM TURNER,
all sued in their official or representative capacities only,
Defendants.

ORDER

On December 4, 1991, Michael Figures and Joseph Mitchell moved to intervene, as a class, on behalf of themselves and on behalf of all similarly situated persons pursuant to Rule 24 of the *Federal Rules of Civil Procedure*. (Document #39). The intervenors define their class "so as to include all qualified electors who are African-American residents of the State of Alabama." *Complaint In Intervention* (Document #39). *See* Rule 23(b)(1).

The Court **GRANTS** the motion to intervene as plaintiffs pursuant to Rule 24(b). The Court certifies the intervenors, as a class, with Mr. Figures and Mr. Mitchell serving as class representatives pursuant to Rule 23(b)(1)(B).

The Court has previously notified the intervenors' counsel of the various deadlines outlined in the Court's Order of November 22, 1991 [Document #35]. These deadlines remain fixed.

On December 6, 1991, Charles Steele and Garria Spencer filed a motion seeking to join the pending motion to intervene "as if [it was] filed in their own names." (Document #47). This motion to join the intervention is GRANTED upon Mr. Steele and Mr. Spencer jointly filing, with Mr. Figures and Mr. Mitchell, an amended Complaint in Intervention. This Complaint should specify Mr. Steele and Mr. Spencer's interest in this action, their county of residence, and whether their proposed role in the litigation will be to serve as additional class representatives.

The Clerk is directed to notify all the parties of this Order by telephone, to be confirmed by mail.

The Honorable Emmett R. Cox, Circuit Judge, and the Honorable W. Harold Albritton, District Judge, appointed to serve with the undersigned as members of the three-judge panel for the instant action, concur in this Order.

Done this 9th day of December, 1991.

/s/ W. Brevard Hand
W. Brevard Hand
Senior District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. 91-0787-BH

PAUL CHARLES WESCH,
Plaintiff,

vs.

GUY HUNT, et al.,
Defendants.

SUPPLEMENTAL STIPULATION

According to the 1990 data compiled and released by the United States Bureau of the Census, the African American population in the State of Alabama is sufficiently compact and contiguous to comprise a single member significant majority (65% or more) African American Congressional district. Consequently, all parties agree that a significant majority African American Congressional district should be created.

DATED this the 3rd day of January, 1992.

/s/ Marc Givhan
MARC GIVHAN
Attorney for James Evans
and Billy Joe Camp

/s/ A.S. Agricola
ALGERT S. AGRICOLA
Attorney for Guy Hunt

/s/ James C. Wood
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Attorney for L.W. Noonan

/s/ John H. England, Jr.
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Attorney for Intervening Plaintiffs

/s/ Bruce Wilson
BRUCE N. WILSON
Attorney for Clarence Watters

/s/ David A. Boyett, III
DAVID A. BOYETT, III
Attorney for Plaintiff

APPENDIX E

[14] * * *

Q Now, the Sam Pierce "Zero" plan contains a major black district, does it not?

A Yes it does.

Q Now, I will refer you now to plaintiff's exhibit six. Can you see that from here?

A Yes.

Q Would you indicate to the court where the majority black district is in the Sam Pierce?

A That would be the blue district in the middle western part of the state.

Q Let's label that District seven, can you see that?

A The numbers are hard to see from here.

Q Now, do you know what percentage of the total population in that district is black?

A Sixty-seven point sixty-nine.

[15]

Q Do you know what percentage of voting age population in that district is black?

A Sixty-three point five eight.

Q And have you determined what percentage of registered voters in that district is black?

A Yes, the reapportionment office has data on the race of the registered voters as of December, 1990, and that figure for that district in the Pierce plan is fifty-five point five five percent.

Q Now, have you compared the Pierce "Zero" plan to the Reed plan in terms of the percentage composition of the majority black district?

A Yes, I have.

Q How does the Pierce "Zero" plan compare to the Reed plan in terms of the percentage composition of its majority black district in terms of the total population?

A Slightly higher, by one percentage point.

A How does the Pierce "Zero" plan compare to the Reed plan in terms of voting age population, that is black in the majority black district?

A About four tenths of a percentage point higher in the Pierce plan.

Q How does the Sam Pierce "Zero" plan compare to the Joe Reed plan in terms of the black voting age **[16]** population in the majority black district?

A The Pierce plan is a little over three percentage points higher than the Reed plan.

Q Now, do you have any opinion, based upon your study of the Sam Pierce "Zero" plan and the data relevant to that plan, as to whether the Sam Pierce "Zero" plan would provide black voters with a viable opportunity to elect a candidate of their choice?

A Yes, I have an opinion on that.

Q What is that opinion?

A I believe it will provide that opportunity.

Q Do you have an opinion as to whether the Sam Pierce "Zero" plan will dilute the voting strength of the black voters in Alabama?

A No, I don't think it will dilute the black voting strength.

Q What is the basis of those two opinions you just expressed?

A Well, essentially I would say it is a viable district and non diluted for three reasons. One, it has — the racial composition of the district is slightly more black in voting age population and, as I said, three percentage points in registration, than the Reed plan. And I am familiar with the background of Mr. Reed and I don't think he would be diluting the votes of [17] African-Americans in the State of Alabama in a plan that he proposes and it also satisfies the rules of thumb of sixty-five percent in terms of total population but more importantly it provides over fifty-five percent black voter registration in that district.

Q Now, have you compared the Pierce "Zero" plan to the other four plans that have been submitted in this case in terms of composition of total population, voting age population, and registered voter population in the majority black district of those plans?

A Yes, I have.

Q Can you briefly summarize where the Pierce "Zero" plan ranks in terms of percentage composition of black voters or black residents in its majority black district, ranking it in accordance with the other plans?

A In terms of total population, it has the second highest percentage. It is about three tenths of a percentage point below the Modified Unity plan. In terms of the voting age population, again it is the second highest and it is less than one percentage point below, again, the Modified Unity plan. In terms of voter registration, it is the most black district in all the plans. * * *

[48] * * *

BY MR. ENGLAND:

Doctor Engstrom, did you have an opportunity to review and compare the Pierce "Zero" plan, the Reed plan and the plan that is called the Hilliard Two district plan, CD-25, the Modified Unity plan and the Unity plan with respect to the criteria that the legislature set out in its reapportionment guidelines?

A Not all of them. I only compared them in [49] terms of population and the quality and the racial demographics of the districts. The maps I have had of the other plans don't allow me to really get into — I had no real detail characteristics, for example, through which to count county splits or the precinct splits and in a couple of cases the map was illegible in terms of my ability to look at it and distinguish districts.

Q So that you made an assessment then based upon only two criteria of all the plan?

A Of all the plans, based on those two criteria, whether they comply with the population equality or the extent to which they deviate therefrom and the non dilution criteria.

Q As I understand it, you have indicated that with respect to the first criteria that there were problems with the Modified Unity plan, the Unity plan, CD-25 and the Hilliard plan?

A CD-25 has deviations of — combined deviation of a hundred and four people. Then the others have more, the Modified Unity being the one with the greatest deviation, which is combined, over nine thousand people.

Q You then made an evaluation as to the minority district, is that correct?

A Yes.

Q Did you make any determination with respect to [50] that?

A Yes.

Q What was that determination?

A All the plans provided a district, a minority district, of at least sixty-five percent in total population and sixty percent in voting age population, except the Hilliard, I believe the second version. The others have — don't have the voter registration data for CD-25. We do for United and Modified Unity and in Unity it is fifty-two point three percent black and Modified Unity it is fifty-four point six black. The Hilliard plan does not contain a single black majority district in voter registration.

Q In you judgment, does that present a problem regarding the voter dilution claim?

A The Hilliard plan?

Q Yes, sir.

A I have not seen evidence that the Hilliard plan therefore creates viable minority districts.

Q In your opinion, then it would be that the Hilliard plan would not create a viable minority district, based on what you could assess from it?

A Given that the creation of a second district came at the expense of the black figures in the first district, the first majority black district — in other [51] words, creating two means that the one district is going to be less black than in a single black majority plan. I don't know if they are both viable minority districts or either is a viable minority district. I do know that the voting age population is above a majority but voter registration is below a majority. * * *

APPENDIX F

[161] * * *

Q Do you think it is possible for a plan to be fashioned that would give two majority black districts?

A I wouldn't counsel it, frankly.

Q Viable districts?

A I wouldn't counsel it, frankly. I think that the safest way to get a black district is to draw one district sixty-five percent or above. Now, I am not going to sit here and tell you or anyone else under no circumstances, conditions, shape, form or fashion that other results couldn't occur.

But we are talking about one who fashioned a plan based on my experience and based on my knowledge of Alabama politics that I felt much better drawing one district predominantly black with over sixty-five percent black in it. * * *

APPENDIX G

[243] * * *

Q Now, you have expressed some concerns about the viability of the two majority black district plan, it that correct?

A I have concerns about whether we can actually divide the black concentrations in this state in such a [244] way that the black population, you know, could elect a candidate of its choice in either of those districts. It puts a pretty strong burden on the black community, you know, to register hard and turn out hard and they have to do that.

Q In evaluating the viability of a two majority black district plan would one factor you would consider be the extent to which black political leaders in Alabama advocated or promoted the creation of such a plan?

A Could you repeat that question.

Q I am sorry. In evaluating the majority of a two district plan in Alabama, would one of the factors you consider important be the extent to which that plan was supported or advocated by black political leaders?

A Yes, sir. I think it would be very important. * * *

APPENDIX H

[38] * * *

THE COURT: Have you agreed on the language of the stipulation now?

MR. COOPER: Essentially we have.

THE COURT: Can we see it?

MR. ENGLAND: It raises a claim on Section 2, [39] one person one vote, but yes, sir, here it is.

THE COURT: On that stipulation what does it do to your Hilliard claim?

MR. ENGLAND: It makes it difficult.

THE COURT: Guts it, doesn't it?

MR. ENGLAND: Well, the proponent of the plan will give his explanation as to why he feels —

THE COURT: Is he a party plaintiff?

MR. ENGLAND: No, sir. He is not a party plaintiff. That is one of the plans, you know, we attempted to file on behalf of a class of people, many of whom had different views about the subject.

THE COURT: Well, let me ask you this, we did grant class status and you are limited class status and you have — you are representing the class and I assume Mr. Hilliard in that class?

MR. ENGLAND: That is correct.

THE COURT: Can you stipulate him out of court?

MR. ENGLAND: Your Honor, this stipulation contains a significant minority district and the rational [sic] provided by

that individual to support that plan indicates its own justification from varying from that, you know, from, everybody in the class with one possible — with the possible exception of that person [40] wanted that plan to have a sixty-five percent majority district.

They could do it under the constraints that we say. So that is the highest percentage that they come up with and I am comfortable that that stipulation is not inconsistent with what the class desires and my purpose in presenting the Hilliard plan is to make sure the court has an opportunity to view every significant group that has represented something in the class that we seek to represent. * * *